IN THE
INDIANA SUPREME COURT

No. 94S00-0010-CQ-609 & 94S00-0010-CQ-610

LIVINGSTON, JANET, et al. Plaintiffs, vs. FAST CASH USA, INC., et al. Defendants.	)	U.S. District Court for the Southern District of Indiana, Case No. IP99-1226-C(B/S), and all other District Court Cases Consolidated Into It, Including: IP99-1887-C(B/S); IP-00-45-C(D/S); IP-00-46-C(T/S); IP-00-60-C(B/S); IP-00-121-C(H/S); IP-00-122-C(Y/S); IP-00-137-C(H/S); IP-00-138-C(B/S); IP-00-163-C(M/S); IP-00-165-C(T/S); IP-00-166-C(H/S); IP-00-339-C(H/S); IP-00-676-C(H/S); IP-00-902-C(H/S); IP-00-903-C(H/S); IP-00-957-C(B/S); IP-00-964-C(B/S); IP-00-1001-C(H/S); IP-00-1101-C(H/S); and TH-00-32-C(M/S)
WALLACE, KELLI R., et al. Plaintiffs, vs. ADVANCE AMERICA CASH ADVANCE CENTERS OF INDIANA, et al., Defendants.	)	U.S. District Court for the Northern District of Indiana, Case No. 2:00cv0123AS and all other District Court Cases Consolidated Into It, Including: 2:00cv0179AS; 2:00cv0189AS; 2:00cv0313AS; 2:00cv0388AS; 3:00cv0070AS; 3:00cv0072AS; 3:00cv0077AS; 3:00cv0259AS; 3:00cv0724AS; 1:00cv0101AS; 1:00cv0102AS; 1:00cv0181AS; 1:00cv0276AS; 1:00cv0314AS.

BRIEF OF *AMICUS CURIAE*
INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS

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SUMMARY OF ARGUMENT

Defendants in this case are part of what has been termed the "payday lending" industry ("the Industry"). In general, the payday lending process works like this: To borrow $100, the debtor writes the lender a check for that amount plus whatever finance charge is assessed by the lender (the average charge in Indiana is $27). In return, the lender gives the debtor $100 in cash with payment due in a short time (usually less than two weeks). When the loan comes due, the debtor either repays the lender the amount borrowed plus the finance charge in cash, or the lender deposits the borrower's check. If the debtor lacks sufficient funds to pay the loan when due, the lender may extend or renew it for another short period for another finance charge.

These practices have come at great cost to consumers. In 1999, the Indiana Department of Financial Institutions ("the Department") audited payday lending practices in Indiana and found that the average payday loan amounted to an average Annual Percentage Rate ("APR") of 499%Cdrastically exceeding the maximum interest rates allowed by Indiana usury laws. The Department also found evidence of abusive lending and collection practices.

The Industry claims that Article 4.5 of the Indiana Code justifies these abusive practices. The Department disagreed, and so did the Attorney General. Although there existed between 1982 and 1994 a statutory basis for exempting minimum finance charges from the calculation of maximum interest rates, this exemption was deleted by the General Assembly in 1994. This Court has long held that, when a statute contains certain language that is later deleted, there is a presumption that the legislature intended the deletion to change the law. In such cases, this Court cannot read a statute to include that which was deleted. Moreover, while at one time the General Assembly provided an exception to the maximum finance charges found in Article 4.5, there has *never* been an exception to the 72% maximum rate found in the criminal usury statute.

Finally, the Department's licensing of payday lenders is not an administrative interpretation that implicates the doctrine of legislative acquiescence. If the doctrine applies at all, it applies only to the legislature's acquiescence to the interpretation of this statute found in the Attorney General's opinion which concluded that payday lending practices violate Indiana law. Moreover, the Department has not promulgated regulations respecting this issue, nor has it formally construed the statute by any adjudicative procedure. Other than issuing the same license it issues to other consumer lenders, the Department has done nothing to condone or approve of the lending practices of payday lenders. And even if the mere act of licensing payday lenders could otherwise trigger acquiescence, the Department's licensure of this new breed of commercial lender beginning in 1994 is not the type of "long adhered to administrative interpretation" required to earn deference from this Court.

If the Industry is harmed by the application of Section 4.5 to its lending practices, the proper and constitutional course of action is to petition the General Assembly to amend the statute and re-insert the language granting an exception from APR limits. Until that time, however, the Industry must comply with Article 4.5.

ARGUMENTS

I. The Indiana Department of Financial Institution Shares the Concern Expressed Nationwide With Regard to the Lending Practices of Payday Lenders.

In the past few years, the consumer credit market has become inundated with payday lenders.[1] While payday lending is very profitable to the lender, as discussed below, it often has a devastating effect on consumers:

[1] In 1994, when the first payday lender was issued a consumer loan license in Indiana, there were 11 licensees with 15 locations making loans of $12 million. (Pl. App. at 16.) By 1999, there were 126 licensees with 551 locations across Indiana. (Id.) In 1998, almost $300 million in payday loans were made in Indiana. (Id.)

> [C]onsider the case of Janet Delaney, a $16,000-a-year hospital food service worker who needed $200 to pay her bills. She wrote a check she couldn't cover to a check casher who gave her $200 on the spot and agreed not to cash the check until her next payday for a $38 fee. On her next payday, Ms. Delaney did not have $200 to pay the check casher, so she paid the payday lender another $38 to defer payment another two weeks. A year later, she had paid $1220 in fees and still owed $200. Over a twelve month period, Ms. Delaney paid 610% interest, returning to the payday lender thirty-two times and borrowing from two other payday lenders just to make the fee payments.

Lisa Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions and the Need for Regulations*, 51 ALA. L. REV. 1725, 1729 (2000) ("*Modern Day Loan Sharking*") (footnotes omitted).[2] Accordingly, states and governmental agencies charged with protecting consumersCliketheDepartment[3]Chave been considering appropriate responses. One of these responses has involved

[2] "Payday lending is one of our nation's fastest growing industries, yet it is simply a modern day version of consumer abuses practiced at the beginning of the Twentieth Century. The typical 'loan shark' deal was a loan for $5 on a Monday, repayable on Friday (pay day) for $6. Ignoring compounding, this is an annual interest rate of 1,040%. Those terms are typical of today's cash advance or payday loan. Payday lenders typically lend smaller sums than loan sharks ($100 to $500), but charge interest rates that 'would have made the Gambino family blush.'" *Modern Day Loan Sharking*, at 1731-32 (footnotes omitted).

[3] The Department's mission is to "regulate and supervise . . . licensees under the Uniform Consumer Credit Code in a manner that assures the residents of Indiana adequate and proper financial services; protects the interest of . . . consumers; and promotes safety and soundness in Indiana financial institutions." (Department Mission Statement, www.dfi.state.in.us/administration/mission statement.) Moreover, "[t]he underlying purposes and policies of [Article 4.5] are: . . . to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors."

state usury laws such as the ones at issue here.

Usury laws protect against "[t]he reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." BLACK'S LAW DICTIONARY, *Usury*, at 1545 (6th ed. 1990). "[W]ith the humanitarian purpose of protecting needy borrowers from unconscionable moneylenders, the legislatures of many states have enacted laws limiting the rate of interest the lender of money may charge for its use." 45 AM. JUR. 2D *Interest and Usury* ' 3 (1999). As discussed below, Indiana's usury laws are contained in the section governing small consumer loans and the purpose of small loan acts is "to protect from exorbitant and unconscionable demands the poor and needy who are compelled by necessity to borrow small sums." Id. at ' 58. Because "[t]he object of usury legislation [is] to protect borrowers from the outrageous demands often made and required by lenders, the laws should be so construed as to accomplish this purpose." Id. at ' 6. It is within this framework that the lending practices of payday lenders should be reviewed.

As a matter of background, the consumer finance industry categorizes credit markets as "prime" and "subprime." *See* Lynn Drysdale & Kathleen Keest, *The Two-tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 590 (2000) ("*Fringe Banking*"). The prime consumer credit market is reserved for creditworthy borrowers and includes purchase-money home mortgages, secondary mortgages, home equity loans, credit cards, and automobile loans. Payday lending is considered part of the "subprime" consumer credit market (also known as the "fringe banking" sector). Id. at 591, 595.

IND. CODE ' 24-4.5-1-102(d).

> [T]his [subprime] market has become a major source of traditional banking services for low-income and working poor consumers, residents of minority neighborhoods, and people with blemished credit histories. Those who have no concerns about the emergence of this market consider it simply part of a trend toward niche marketing offering a needed and desired service to people previously unable to participate in the credit societyCin short, the "democratization of credit." Critics of the phenomenon, on the other hand, call the trend "financial apartheid" or the "second-class" marketplace.

Id. at 591. The decision to lend money is made on the spot as long as the debtor has a driver's license and recent pay stubs; lenders make no further effort to check the borrower's creditworthiness. Id.

At the Washington D.C. Forum on Short-Term High-Interest Paycheck Advances, convened by Senator Joseph Lieberman in 1999, the Department testified that its recent audit of payday lending practices in Indiana revealed that the average payday loan here amounted to $165 with an average finance charge of $27, and an average duration of 13 days. (Pl. App. at 23.) That translates into an average APR of 499%. In its survey, the Department found one example of a $20 charge on a one-day $100 loan, which amounts to a 7,300% APR. *Fringe Banking*, at 603. The Department also found evidence of abusive lending practices with initial fourteen-day terms being reduced to seven-day terms upon renewal. Id. As one commentator has noted:

> On a practical level, the harm of usurious deferred presentment check cashing goes beyond the grossly exorbitant rates charged by payday lenders. The high rates alone contribute to unmanageable levels of personal indebtedness among low and modest income households, sending many desperate consumers into a downward spiral of indebtedness which ultimately forces them into bankruptcy. Furthermore, the oppressive, fraudulent abuses of less-sophisticated consumers practiced by usurious check cashing lenders rises to the level of unconscionability.
> . . .
> According to the Consumer Federation of America, "[p]ayday loans are based on a fraudulent premise" because both the borrower and lender know that at the time the check is written, the borrower does not have sufficient funds on deposit to cover the check.

Modern Day Loan Sharking, at 1742-43.

One of the more troubling aspects of payday lending practices is the incidence of "roll overs"

that occur when a debtor cannot repay her loan and therefore renews it for another fourteen days with another fee charged. The Indiana Department survey found a 77% roll-over rate, with the average customer renewing the loan ten times, and a high of sixty-six times. Id. An Illinois study similarly reported that "the single use customer is rare. '[I]n fact, repeat business is the main source of revenue.'" *Fringe Banking*, at 608.

To avoid appearing to "roll over" the debt, some lenders ask the debtor to take out a "new loan" by paying a new fee and writing another check. Id. at 602. Also, in a practice called "touch and go," lenders take a cash "payoff" for the old loan that they immediately reloan with new loan funds. Id. "Irrespective of whether the repeat transactions are cast as 'renewals,' 'extensions,' or 'new loans,' the result is a continuous flow of interest-only payments at very short intervals that never reduces the principal." Id.

The payday loan industry contends that its practices are merely "a bridge enabling passage through temporary setbacks," focusing "on the convenience of short-term lending: it is handy, quick, and hassle-free; there are no obstacles such as bad credit records." Id. at 605. As the Illinois Department of Financial Institutions explained: "What [the industry] failed to mention was that the financial strains placed on consumers were rarely short-lived." Id. at 609. "Customers playing catch-up with their expenses do not have the ability to overcome unexpected financial hardships because their budgets are usually limited. The high expense of a short term loan depletes the customer's ability to catch-up, therefore making the customer 'captive' to the lender." Id. And, while the payday lenders respond that, when faced with a potential insufficient fund fees for bouncing a $100 check, a $20 payday loan fee is a bargain, id. at 606, this ignores the fact that the loans are rolled over an average of ten times, which makes for a $200 fee on a $100 loan.

If the above practices were not troubling enough, the collection practices of many payday

lenders make the problem even worse. Although the payday lender accepts the debtor's check with full knowledge that there may not be sufficient funds to cover it, when the debtor does not repay the loan when due, the debtor is threatened with criminal prosecution for writing a bad check. Id. at 610. In a single year, payday lenders in one precinct in Dallas, Texas, filed over 13,000 criminal charges with law enforcement officials against their customers. Id. at 610.

Other lenders simply deposit the check after the debtor fails to repay and then proceed under insufficient-funds laws to collect the principal and interest, the regular bounced check fees, triple the check amount as a penalty, and attorney fees. Id. at 611-12. *See* IND. CODE ' 34-23-3-1. The Department found that three payday lenders in Indiana filed 700 lawsuits seeking these treble damages in just two years. (Pl. App. at 18.)

In addition, the Texas Credit Code Commissioner notes that, when the debtor cannot repay the loan, some payday lenders report the "bounced check" to a private check collection service. *Fringe Banking*, at 612. A customer on a bad check list from such services cannot write checks at any business subscribing to this serviceCsuch as grocery stores, etc.Cuntil the customer pays the debt. Id.

The first payday lender was licensed in Indiana in the latter part of 1994.[4] (Pl. App. at 16.) As payday lending practices became more well-known in the late 1990s, state attorneys general and agencies in other jurisdictions began to question whether these practices violated state usury and disclosure laws. *See* Jean Ann Fox, *What Does it Take To Be a Loan Shark in 1998? A Report on the Payday Loan Industry*, 772 Practicing Law Institute, Consumer Financial Services Litigation 987 (1998) (listing the initial actions of attorneys general).

[4] There is no such thing as a "payday lender license." Payday lenders, like other financial institutions, apply for and receive a regular consumer loan license under the Indiana Unform Consumer Credit Code.

As it became aware of these questionable lending practices, Indiana joined other jurisdictions in looking into whether these practices violated state usury laws. The Department undertook a statewide audit of payday lending practices, which culminated in its request for a formal Attorney General opinion on this issue. The Attorney General concluded:

> [L]enders violate Indiana law when they offer supervised loans having finance charges that exceed the annual percentage rates (APRs) set out in Indiana's consumer credit code. Finance charges that exceed the statutory caps outlined in this code are subject to refund. A transaction is void and violates Indiana's loansharking statute if the lender charges an interest rate greater than twice the rate authorized for finance charges in the consumer credit code.

(Pl. App. at 68.) The Department sent copies of this opinion to every licensed payday lender in Indiana. (Id. at 136.)

The Attorney General's opinion prompted some members of Indiana's payday-loan industry to file a state declaratory judgment action against the Department, seeking a declaration of their legal rights with respect to the statutes at issue here. *See* Indiana Deferred Deposit Assoc., Inc. v. Department of Financial Institutions, Cause No. 49D12-0002-CP-00234 (Marion County, Indiana 2000).[5] That lawsuit, however, was resolved on procedural grounds, id., and did not reach the merits that are now squarely before this Court.

II. The Statutory History of the Indiana Uniform Consumer Credit Code Forecloses the Industry's Arguments.

A. The History of the Uniform Consumer Credit Code and the 1994 Amendments.

Article 4.5 of Title 24 is the Indiana Uniform Consumer Credit Code. Article 4.5 addresses two types of consumer credit arrangements: Credit sales (Chapter 2) and consumer loans (Chapter

[5] This Court may take judicial notice of a public record at any stage of the proceeding, including on appeal. *See* IND. EVIDENCE RULE 201; Mayo v. State, 681 N.E.2d 689, 693 (Ind. 1997); Wayne Township v. Lutheran Hosp., 160 Ind.App. 427, 430 n.2, 312 N.E.2d 120, 122 n.2 (1974).

3). Indiana's General Assembly enacted Article 4.5 in 1971.

The original version of Article 4.5 contained three provisions that established a lender's maximum finance charge for:

(1) credit sales, IND. CODE ' 24-4.5-2-201 ("2-201") (interest not exceeding greater of 18% flat rate[6] or a graduated rate up to 36%);

(2) unsupervised consumer loans, IND. CODE ' 24-4.5-3-201 ("3-201") (interest not exceeding 18%); and

(3) supervised consumer loans, IND. CODE ' 24-4.5-3-508 ("3-508") (interest not exceeding greater of 18% flat rate or a graduated rate up to 36%).[7]

See P.L. 366-1971, Sec. 3 and 4 (attached at Tab A).[8] These provisions were based almost verbatim on the Model Uniform Consumer Credit Code, attached at Tab B.

As enacted in 1971, these three provisions were almost identical to each other, *see* Tab A, except that the provision in 2-201 regarding maximum credit service charges also had a subsection providing for a minimum credit service charge that was not found in 3-201 or 3-508:

> Notwithstanding subsection (2) [setting maximum interest rates], the seller may contract for and receive a minimum credit service charge of not more than five dollars ($5) when the amount financed does not exceed seventy-five dollars ($75), or not more than seven dollars fifty cents ($7.50) when the amount financed exceeds seventy-five dollars ($75).

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[6] In 1981, the 18% limit was increased to 21%, where it remains today.

[7] A loan is classified "supervised" or "unsupervised" depending on its interest rate. A loan will be supervised if the lender wishes to utilize the increased rates found in 3-508. If the lender chooses to not exceed 18%, the loan is unsupervised.

When Article 4.5 was enacted, the distinction between supervised and unsupervised loans was significant because the Model Uniform Code included first mortgage loans within the scope of Chapter 3 and treated certain aspects of supervised loans different from unsupervised loans. In 1981, however, the General Assembly parted with the Model Uniform Code and substantially removed first mortgage loans from the scope of Chapter 3. Similarly, by 1992, the remaining supervised loan distinctions were repealed. Thus, the only remaining distinction between supervised and unsupervised loans is the fact that unsupervised loans charge a flat rate whereas supervised loans use a higher graduated rate.

[8] For the convenience of this Court, the Department has attached the relevant Public Laws and legislative history cited in this brief as Tabs A-G.

IND. CODE ' 24-4.5-2-201(6), as amended by P.L. 366-1971, Sec. 3 (Tab A). From 1971 to 1982, only 2-201 had the "minimum charge" provision at issue in this case. In 1982, the General Assembly added the same provision to 3-508:

> Notwithstanding subsection (2) [setting maximum interest rates], . . . the lender may contract for and receive a minimum loan finance charge of not more than five dollars ($5) when the original principal balance of the obligation does not exceed seventy-five dollars ($75), or not more than seven dollars fifty cents ($7.50) when the original principal balance of the obligation exceeds seventy-five dollars ($75).

IND. CODE ' 24-4.5-3-508(7), as amended by P.L. 149-1982, Sec. 4 (Tab C).

In 1992, the amount of the minimum charge in both 2-201 and 3-508 was increased to thirty dollars. *See* IND. CODE ' ' 24-4.5-2-201 and 24-4.5-3-508, as amended by P.L. 14-1992, Sec. 15, 38 (Tab D). A similar "minimum charge" provision was then added to 3-201. *See* ' 24-4.5-3-201,[9] as amended by P.L. 14-1992, Sec. 25 (Tab D). Thus, in 1992 lenders could lawfully collect thirty dollars as a minimum finance charge, *even if it resulted in a charge exceeding the maximum interest rates identified in the statutes*.

That changed, however, in 1994 when the General Assembly revised 3-508(7). Specifically, the legislature removed language that previously exempted the minimum charge from the maximum

[9] "(1) Except as provided in subsection (6), with respect to a consumer loan other than a supervised loan (IC 24-4.5-3-501), a lender may contract for and receive a loan finance charge, calculated according to the actuarial method, not exceeding twenty-one percent (21%) per year on the unpaid balances of the principal. . . . (6) With respect to a regulated loan not made pursuant to a revolving loan account, the lender may contract for and receive a minimum loan finance charge of not more than thirty dollars ($30)." IND. CODE ' 24-4.5-3-201, as amended by P.L. 14-1992, Sec. 25.

charges for supervised loans:

> ~~**Notwithstanding subsection (2),**~~ With respect to a supervised loan not made pursuant to a revolving loan account, the lender may contract for and receive a minimum loan finance charge of not more than thirty dollars ($30).[10]

[10] The amount is now $33. *See* IND. CODE ' 24-4.5-1-106.

IND. CODE ' 24-4.5-3-508(7), as amended by P.L. 122-1994, Sec. 27 (Tab E).[11] This statutory change was substantive. By removing the phrase "Notwithstanding subsection (2)," the legislature repealed the prior rule that permitted lenders to charge a fixed-dollar fee regardless of the resulting interest rate. Thus, since 1994, the minimum loan finance charge for supervised loans has been limited by the maximum APRs provided in subsection (2).

B. This Court Should Reject the Industry's Proposed Interpretation Which Undoes

[11] The 1994 amendments at issue were authored by Representative Henderson in the House and sponsored by Senators Skillman and Worman in the Senate. (Tab F.) The proposed changes to 3-508 (as well as many other changes to Article 4.5) were included by Legislative Services Agency ("LSA") as part of House Bill 1278 and sent to the House Committee on Financial Institutions. (Id.)

The first reading of HB 1278 was in Committee, which unanimously submitted the bill to the House without any changes to the amendment deleting "Notwithstanding subsection (2)" from 3-508(7). (Id.) The second reading was done on the House floor and, after the bill was read for a third time to the House, it passed 98-1. (Id.)

House Bill 1278 was then referred to the Senate Committee on Insurance and Financial Institutions. The Committee unanimously recommended that it be passed and, although there were amendments to other provisions, there was no change regarding the amendment to 3-508(7). (Id.) The second reading was done on the Senate floor and, after the bill was read for a third time in the Senate, it passed 48-0. (Id.)

Engrossed House Bill 1278 was then sent back to the House to vote on the Senate amendments, which were accepted by a vote of 96-0. (Id.) The Speaker of the House and President of the Senate then signed Enrolled Act 1278 and, on March 14, 1994, the Governor signed into law the Act which deleted the words "Notwithstanding subsection (2)" from 3-508(7). (Id.)

the General Assembly's Legislative Change.

As this Court recently noted, "A fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has changed." United Nat'l Ins. Co. v. DePrizio, 705 N.E.2d 455, 460 (Ind. 1999). "Such an amendment raises the presumption that the legislature intended to change the law unless it clearly appears that the amendment was passed in order to express the original intent more clearly." Id. This presumption is even stronger when the legislature *deletes* language from the statute: "[W]hen a statute contains certain language which is later deleted, we presume that the legislature was cognizant of the presence and meaning of the language and intended by its decision to change the law." Allstate Ins. Co. v. Larkin's Body Shop & Auto Care, 673 N.E.2d 846, 849 (Ind.Ct.App. 1996) (finding that court could not apply the deleted statutory language because to do so would impose the "very obligations that existed under prior [deleted] law").

The court in Joe v. Lebow, 670 N.E.2d 9 (Ind.Ct.App. 1996), was asked to enforce the law as it existed before applicable amendments. The court refused to do so, noting that "it is clear that the legislature has deleted or modified certain language which embodied the strict standard." Id. at 19. In such cases, the court "cannot simply 're-read' into a statute language which has been deleted." Id. *Accord* Whitacre v. State, 412 N.E.2d 1202, 1206 (Ind. 1980) ("We will not . . . add something to a statute which the legislature has purposely omitted.").[12]

[12] *See also* Huff v. Biomet, Inc., 654 N.E.2d 830, 834 (Ind.Ct.App. 1995) ("The Wage Payment Statute was amended in 1989 to exclude the term "thereof." Because the specific language of the statute . . . has been amended . . . we must determine whether the Wage Payment Statute, *as amended*, was applicable") (citation omitted) (emphasis added); Bonge v. Risinger, 511 N.E.2d 1082, 1084 (Ind.Ct.App. 1987) ("Where language is deleted from a statute, a legislative intention to change the meaning of the prior statute is demonstrated. . . . In construing a statute it is just as important to recognize what the statute does not say as it is to recognize what it does say."); Frey v. Review Bd. of Employment and Security Division, 446 N.E.2d 1341, 1344 (Ind.Ct.App. 1983) ("When a statute on a subject contains certain language which is later deleted, statutory construction indulges in the presumption the legislature was cognizant of the presence and meaning of the language and intended by its deletion to change the law."); Lake County Beverage Co. v. 21st Amendment,

Inc., 441 N.E.2d 1008, 1011 (Ind.Ct.App. 1982) ("We can only conclude that the legislature, by deleting the language regarding the enjoyment of a permit as a property right, intended that a permit holder has a recognizable interest in the use of his liquor permit."); Landers v. Pickering, 427 N.E.2d 716, 718 (Ind.Ct.App. 1981) ("This version of the above section is much different than the original enactment which allowed the employee an election of remedies. This section was amended in 1937 and the language granting the election of remedies was deleted. A fundamental rule of statutory construction is where a prior statute contains certain language, and a later statute deletes the language, it is presumed that the legislature was cognizant of the prior language and intended to change the law by the deletion. We believe that the legislative intent of the statutory amendment was to delete the alternative remedies for non-compliance with the Act.") (citation omitted); Tarver v. Dix, 421 N.E.2d 693, 698 (Ind.Ct.App. 1981) ("In view of the deletion of this language in the new statute and the above rule of construction, we find no statutory authority vested in the court to impose a one year sentence to enforce the order to furnish bond.") (citation omitted).

The only time this presumption does not apply is when the deletion "was made merely to express more clearly the original intention of the legislature." Johnson County Farm Bureau Coop. Ass'n v. Indiana Dept. of State Revenue, 568 N.E.2d 578, 585 (Ind. Tax Ct. 1991) (involving statutory language deleted as part of recodification), *aff'd*, 585 N.E.2d 1336 (Ind. 1992). Unlike the statutes in Johnson County, the 1994 Amendment to 3-508 was not part of a recodification. Likewise, the deletion could not have been made "merely to express more clearly the original intention of the legislature." Id. The original intention of the legislature in 1982 was to *create* an exception to the maximum loan finance charge, as evidenced by the inclusion of the language "Notwithstanding subsection (2)." The 1994 AmendmentCmade twelve years after the original enactment of 3-508Cdeleted the very language that had provided the exception, thereby leaving the exact opposite result from the original legislation, which cannot be said to clarify the original intent. *Accord* Pierce Governor Co. v. Review Bd. of the Ind. Employment Security Division, 426 N.E.2d 700, 703 (Ind.Ct.App. 1981) ("We find nothing which indicates that the amendment was made only to express more clearly the original intent.") (citation omitted).

Thus, contrary to the Industry's request, this Court should not disregard the General Assembly's affirmative act of statutory excision and read 3-508(7) as though the deleted language were still present. If, as the Industry argues, this amendment creates unintended hardship on them, the proper and constitutional course of action is to have the General Assembly amend the statute and re-insert the language granting an exception from APR limits. To allow otherwise would require this Court to do exactly what it refused to do in Schwartzkopf v. State, 246 Ind. 201, 204 N.E.2d 342 (1965), when it found that "[w]hat, in effect, the appellants are asking us to do is read into the statute a requirement which simply is not there. This we cannot do because it has been held on a number of occasions that the court will not add something to a statute when the Legislature has purposely

omitted it." Id. at 206, 204 N.E.2d at 345. *Accord* Indiana Bell Telephone Co. v. Indiana Utility Regulatory Comm'n, 715 N.E.2d 351, 358, 360 (Ind. 1999) (finding that the remedy sought was one that should be resolved by the General Assembly, not the courts).

C. The 1994 Amendment to Section 3-508 Serves a Rational Purpose.

The effect of the General Assembly's 1994 amendment was to return 3-508 to the form in which it was enacted in 1971, when it tracked the Model Uniform Code and did not contain an exception to the maximum loan finance charge. To this day, the Model Uniform Code provides an exception in 2-201, but not in 3-508. (*See* Tab B.)

Moreover, what is left of subsection (7) has not been rendered meaningless or irrational. The modified provision serves to allow a lender to recover up to thirty-three dollars where a loan which would have otherwise accrued more than thirty-three dollars in interest is paid off early. This allows the lender to recoup administrative costs associated with the loan and expected to be recovered in the interest payments, which is why it is called a "minimum" finance charge. The manner in which the Industry is attempting to interpret the statute is illogical. A "minimum" charge suggests there is an alternative charge that would be greater. For example, in the more common consumer loan scenario, the greater alternative to the minimum charge in subsection (7) is the regular finance charge found in subsection (2), *i.e.*, the total interest payments a lender would receive if the loan were paid off over the expected time period. Given the specific lending practices of payday lenders, however (*i.e.*, much shorter terms and much smaller principal amounts than traditional consumer loans), under the Industry's interpretation the *minimum* charge allowed by subsection (7) would actually be the *maximum* charge permitted. No greater alternative change would be possible under subsection (2).

Likewise, and contrary to the Industry's arguments, the types of loans benefitting from 3-

508(7) are not necessarily large, long-term loans. For example, if a lender makes a single-pay loan of $500 for 92 days, the lender would be entitled to a maximum interest rate of 35.70%.[13] If the debtor pays off the loan as planned, the lender would receive $45 total interest. If, however, the debtor paid it off with his next paycheck 14 days after taking the loan, the finance charge accrued for 14 days would only be $6.85. Under amended 3-508(7), the lender is permitted to contract to recover a minimum loan finance charge of $33[14] instead of the $6.85 actually accrued, and the $33 charge is still within the maximum 36%. Thus, the application of 3-508 as amended yields a rational, reasonable result that is not inconsistent with any other provisions of Article 4.5.

Because the average payday loan is for less money and a shorter term than used in the example above, the limitations of 3-508(7) restrict the finance charge that payday lenders can collect. If those limitations are to be removed, it is the province of the General Assembly to remove them. In other contexts, the General Assembly has shown that it recognizes that certain consumer credit transactions do not fit within Article 4.5 and has placed those transactions in Article 7 of Title 28, titled "Specialized Financial Institutions." For example, Article 4.5 provides that the provisions of the Uniform Consumer Sales and Credit Act do not apply to "[t]he rates and charges and the disclosure of rates and charges of a licensed pawnbroker established in accordance with a statute or ordinance concerning these matters." IND. CODE ' 24-4.5-1-202. Instead of Article 4.5, consumer loans made by pawnbrokers are subject to the provisions found in Indiana Code sections 28-7-5-1 to 38. These statutes take into account the unique lending practices of pawnbrokers and provide for

[13] Pursuant to Indiana Code section 24-4.5-1-106, this 36% applies to any loans under $930. This APR is slightly less than 36% because the calculation is based on a 365 day year on a single-pay transaction.

[14] *See* IND. CODE ' 24-4.5-3-210(2).

fees greater than those allowed under Article 4.5 and even exempt those fees from the criminal usury limits:

> In addition to the loan finance charge authorized by section 28 of this chapter, a pawnbroker may charge, contract for, and receive a fee not to exceed one-fifth (1/5) of the principal amount of the loan per month or any fractional part of a month for servicing the pledge that may include investigating the title, storing, providing security, appraisal, handling, making daily reports to local law enforcement officers, and for other expenses and costs associated with servicing the pledge. Such a charge when made and collected is not interest and is not a rate under [the criminal usury statute] IC 35-45-7-1.

IND. CODE ' 28-7-5-28.5.

If the payday lenders find burdensome the constraints placed upon them by Article 4.5 (constraints that existed when the payday lending industry originated), they must do as the pawnbrokers did and petition the General Assembly to lift those constraints. Until that happens, however, payday lenders must comply with Article 4.5.

D. The Department's Position on Legislation it Did Not Propose Is Legally Irrelevant.

In the District Court below, certain Industry Defendants attempted to use the deposition testimony of Department Consumer Credit Supervisor Mark Tarpey to support their assertion that the "there was no legislative intent to change the meaning of the statute" when "notwithstanding subsection (2)" was deleted from 3-508(7). (Pl. App. at 74) (Defendants' Memorandum). Mr. Tarpey's testimony, however, can do no such thing.

This Court has held that even "the motives of individual sponsors of legislation cannot be imputed to the legislature, absent statutory expression." O'Laughlin v. Barton, 582 N.E.2d 817, 821 (Ind. 1991) (finding admission of affidavit was error). In this case, Mark Tarpey is not a legislator

and the Department had nothing to do with this amendment.[15] (Pl. App. at 64.) Therefore, Tarpey's testimony does not and could not illuminate the legal significance of this unambiguous statutory revision. *Accord* Faris Mailing, Inc. v. Indiana Dept. of State Revenue, 557 N.E.2d 713, 718 (Ind. Tax Ct. 1990) (noting that "By stating that [Representative] Reppa, as the sponsor, believed or understood this, does not mean that the rest of the legislature believed or understood that IC 6-8.1-3-5 merely updated IC 6-2-1-33. . . . '[T]he motives of the sponsors [of legislation] cannot be imputed to the Legislature unless there is a basis for it in its statutory expression.' Because Mr. Reppa's beliefs or understandings, as sponsor, cannot be imputed to the legislature, the affidavit is immaterial and impertinent because it does not assist [the plaintiff] in its cause of action or defense.").

In City of Huntingburg v. Phoenix Natural Resources, Inc., 625 N.E.2d 472 (Ind. 1993), this Court found that the admission of the testimony of a state representative who was involved in the recodification of a statute was in error. Id. at 475. In doing so, the court noted that Indiana Aeronautics Comm'n v. Ambassadair, Inc., 267 Ind. 137, 368 N.E.2d 1340 (1977), was the "sole Indiana case that has upheld the admission of a sponsor's testimony." Id. In Ambassadair, the court addressed whether a statute was constitutional and found that testimony from the drafter of legislation "may be relevant and useful in determining legislative purpose in a case such as this, however, it does not bind the court. Even in the face of such testimony, a court must go ahead and make an independent determination of [the issue]." Ambassadair, 267 Ind. at 144, 368 N.E.2d at 1344.

[15] That the Department had no role in initiating the amendment at issue is not uncommon at all, nor should it be seen as supporting the Industry's "no legislative intent" argument. As Mr. Tarpey's deposition testimony noted elsewhere, the Department also played no role in the 1982 amendment which *added* the provision that was deleted in the 1994 Amendment. (Pl. App. at 60-61.)

No constitutional challenge to 3-508 has been presented to this Court. Therefore, the Industry cannot bring the testimony of Mr. TarpeyCwho, in any event, is not a legislator and whose agency was not in any way involved in the amendment of 3-508Cwithin the narrow exception recognized by this Court. Accordingly, any attempt by the Industry to use Mr. Tarpey's testimony to show purported legislative intent with regard to 3-508 must be rejected.

III. Separate and Distinct from the Indiana Consumer Sales and Credit Act, Criminal Usury Laws Prohibit the Current Practices of Payday Lenders.

While at one time the General Assembly provided an exception to the maximum finance charges found in 3-508(2), as discussed above, there has *never* been an exception to the 72% maximum rate found in the criminal usury statute which provides:

> A person who, in exchange for the loan of any property, knowingly or intentionally receives or contracts to receive from another person any consideration, at a rate greater than two (2) times the rate specified in IC 24-4.5-3-508(2)(a)(i), commits loan sharking, a Class D felony.

IND. CODE ' 35-45-7-2 (1998). "A loan or a contract for a loan which is made through loan sharking is void." IND. CODE ' 35-45-7-4. Thus, whereas between 1982 and 1994, lenders could collect a minimum finance charge even if it exceeded the 36% rate set in 3-508(2), the exception that existed in the prior (pre-1994) version of 3-508(7) has *never* exempted lenders from the 72% ceiling imposed by 35-45-7-2.

This is confirmed by contrasting the prior exception granted in subsection (7) with the exception granted to Pawnbrokers under Indiana Code section 28-7-5-28.5. Before 1994, subsection (7) exempted lenders only from subsection (2)'s APRs, not from the criminal usury limits. *See* PL 14-1992, Sec. 38 (Tab D). Compare this to the statute setting interest and fees for Pawnbrokers, which explicitly exempts those fees from the criminal usury limits:

> [A] pawnbroker may charge, contract for, and receive a fee not to exceed one-fifth (1/5) of the principal amount of the loan per month or any fractional part of a month . . . . *Such a charge when made and collected is not interest and is not a rate under IC 35-45-7-1 [the criminal usury statute]*.

IND. CODE ' 28-7-5-28.5 (1987) (emphasis added). Moreover, the charge provided in this statute is explicitly characterized as a fee that *is not interest.* The General Assembly has therefore demonstrated that it knows both how to allow fees that are not considered interest, and how to exempt those fees from the criminal usury statute. It has done neither with respect to the payday lender charges.

Thus, while prior to 1994, the General Assembly provided an exception to the interest rates found in 3-508(2), there has *never* been an exception to the 72% maximum rate found in the criminal usury statute. As the Attorney General's opinion recently noted, the payday lending practices violate the criminal usury provisions irrespective of the civil usury provisions in 3-508.

IV. The Department's Licensing of Payday Lenders Is Not an Administrative Interpretation Which Implicates the Doctrine of Legislative Acquiescence.

The Industry has argued the Department's prior act of issuing a license to payday lenders is an administrative interpretation which, under of the doctrine of administrative/legislative acquiescence, should be given persuasive weight by this Court. The Industry's position cannot stand for several reasons.

First, at the beginning of this year, the Attorney General's opinion found that payday lending practices violated 3-508 and the criminal usury statute. Despite the attention garnered by this opinion, the General Assembly did nothing to change either of these statutes. During the legislative session, Senator Allen Paul proposed to create a separate chapter in Article 4.5 to cover payday loans and would permit most of the current lending practices. (Tab G.). Senate Bill 287, however, was

never approved by the Senate Financial Institutions Committee. (Id.) Accordingly, if the legislature has acquiesced in any interpretation of law, it is the interpretation found in the Attorney General's formal opinion.

Second, the Department did not promulgate regulations respecting this issue, nor did it formally construe the statute by any adjudicative procedure.[16] Other than issuing the same license it issues to every type of consumer lender, the Department has done nothing to condone the lending practices of payday lenders, nor has it ever formally approved of such practices. Last year, in White v. Check Holders, Inc., 996 S.W.2d 496 (Ky. 1999), Kentucky's highest court addressed the same issue before this Court. After noting that the Kentucky Department of Financial Institutions merely issued a license allowing payday lenders to operate, the court concluded:

> It is a general rule that a "construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight." However, this Court limits the deference shown to informal agency interpretations that have been arrived at without rulemaking or an adversarial proceeding. As noted, DFI did not promulgate regulations. Nor did it formally construe the 1992 Act by any adjudicative procedure. Therefore, we do not give DFI's informal interpretation of the 1992 Act any significant weight.

Id. at 498 (citations omitted). On the merits, the Kentucky court held that payday loans were not exempt from state usury laws. Id. at 500.

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[16] This is not a situation where the Department itself was responsible for bringing an action against payday lenders asserting a different interpretation; rather, this is a private cause of action brought by private plaintiffs against the Industry. The plaintiffs contend that the specific loans made to them violate the statute. An agency's interpretationCpast or presentCshould not insulate a defendant from liability to private litigants (in this case wronged borrowers) who had nothing to do with the agency's licensing practices. Moreover, Plaintiffs in this case are not alleging that the grant of a license to payday lenders is illegal. It is what payday lenders do *after* they get the license that is at issue.

Indiana State Board of Tax Commissioners v. Fraternal Order of Eagles, 521 N.E.2d 678 (Ind. 1988), is a case with striking similarities. In that case, the State Board of Tax Commissioners ("SBTC") had granted the plaintiff a charitable property tax exemption for a ten-year period prior to 1983. In 1983, the SBTC reversed itself and did not grant the exemption, finding that the plaintiff's conduct did not fall within the statutory definition. Applying the doctrine of administrative/legislative acquiescence, the Tax Court reversed the SBTC decision, finding that the plaintiff's activities and uses of its land and property had been essentially and substantially the same for at least the last fourteen consecutive years and that the SBTC's previous interpretation of the statute had allowed such conduct. *See* Indiana State Bd. of Tax Comm'rs v. Fraternal Order of Eagles, 512 N.E.2d 491 (Ind. Tax Ct. 1987).

On transfer from the Tax Court, this Court reversed and found that the SBTC's prior statutory interpretation was not entitled to a presumption of legislative or administrative acquiescence because the grant of a charitable exemption for all those years had been wrong. Fraternal Order of Eagles, 521 N.E.2d at 681. In doing so, the majority agreed with the concurring opinion of Judge Sullivan in Indiana Department of State Revenue v. General Foods Corp., 427 N.E.2d 665 (Ind.Ct.App. 1980), in which he noted that courts must be careful in the application of administrative acquiescence because otherwise "'once an administrative agency has construed a statute, it may never change its interpretation unless the statute has been amended by the General Assembly. Such implication would require an agency to adhere to an erroneous interpretation of the law and await either a legislative or judicial correction.'" Id. (citation omitted). Finding that Judge Sullivan's reasoning "is especially persuasive when one considers that courts have consistently held that incorrect administrative interpretations do not invoke the doctrine of legislative acquiescence," this Court concluded, "We share Judge Sullivan's trepidation that to so broaden the doctrine would be to trap

administrative agencies in their own mistakes and in the absence of legislative change would force them to continue their errors ad infinitum." Id.

Applying this conclusion to the facts before it, this Court found that, "[t]he wording of the statute clearly did not apply to appellee's situation. The taxing authorities simply were not following the statute . . . ." and therefore did not apply legislative acquiescence because it noted that, in the face of this incorrect agency interpretation, "What would have been [the legislature's] course of action? . . . Is the legislature to more firmly enact the same general principle?" Id. "[W]e find legislative acquiescence when the legislature is apprised of the interpretation of the ambiguous language and does nothing. When this occurs, the interpretation stands until the legislature acts to the contrary. In the case at bar, it is difficult to perceive what action the legislature could have taken if they had so chosen." Id.

Finally, even if the doctrine of legislative acquiescence did apply, the Industry cannot establish that the Department's interpretation was the type of "long adhered to administrative interpretation" required before deference is given by this Court. Indiana Bell Telephone Co., 715 N.E.2d at 358; Shell Oil Co. v. Meyer, 705 N.E.2d 962, 976 (Ind. 1998). In Indiana Bell Telephone Co., since 1924, the IURC had held that a particular statute did not confer jurisdiction over holding companies, but argued to this Court on appeal that recent trends required a different position. Indiana Bell Telephone Co., 715 N.E.2d at 358. The court noted that "This is no obscure backwater of the law. The debate over how much and how to regulate public utilities and their holding companies has been a matter of front page concern for decades." Id. Because the IURC had been interpreting a statute for over *70 years* without objection from the legislature, the court rejected its argument. And in Shell Oil Co., the administrative agency (IDEM) asked this Court to give deference to its interpretation of a statute that was given for the first time on appeal. Shell Oil Co.,

705 N.E.2d at 976. The court found there was nothing in the agency's prior actions to support this interpretation, and thus no basis for deferring to the interpretation. Id.

The contrasts between this case and Indiana Bell Telephone and Shell Oil are many. First, it is not the Department seeking to apply this doctrine; it is the Industry that is attempting to bind the Department to whatever prior interpretation may be attributed to the Department's licensing of payday lenders. Second, not only is there no longstanding prior interpretation by the Department, but the recent actions by the Department support its position on this appeal.

Unlike the debates over how much and how to regulate public utilities and their holding companiesCwhich the court in Indiana Bell Telephone Co. noted had "been a matter of front page concern for decades"Cwhen the first payday lender received a commercial loan license in 1994, the Department was unaware of its lending practices. As noted above, it was not until the late 1990s that states and state agencies around the country became familiar with payday lending practices, and one of the issues that began emerging was the effect of state usury statutes on these lending practices.[17] As with other states, in the late 1990s, Indiana realized that the lending practices of this Industry were problematic. Having learned about specific lending practices, the Department determined that there was serious doubt as to whether those practices were lawful. Specifically, the Department determined that the payday lenders' interpretation of 3-508 was resulting in the unprecedented practice of issuing small dollar, short-term loans with APRs of 300-1000%. These practices were inconsistent with the amendments to 3-508(7) made in 1994. After the opinion of the Attorney General confirmed the Department's position, copies of that opinion were mailed to every payday

[17] The first published decision on this issue did not even appear until 1997. *See* Hamilton v. York, 987 F. Supp. 953 (E.D. Ky. 1997).

lender licensed in Indiana. (Pl. App. at 136.)

The fact that the Department has not yet sought to revoke licenses is indicative of the Department's interpretation of 3-508. Immediately after the Indiana Attorney General confirmed the Department's interpretation, an Association of payday lenders brought a declaratory judgment action against the Department in Marion Superior Court seeking to prevent them from acting upon the Attorney General's opinion. *See* Indiana Deferred Deposit Ass'n v. Department of Financial Institutions, Cause No. 49D12-0002-CP-00234 (Marion County, Indiana 2000). As that lawsuit was being resolved on procedural grounds, the actions in this case were being filed. To revoke licenses while this action is still pending would be precipitous.

Thus, unlike the facts of Indiana Bell Telephone and Shell Oil, the doctrine of legislative/administrative acquiescence is not applicable to the Department's grant of licenses to the Industry Defendants before this Court in this action.

In this case, to the extent that the doctrine of administrative/legislative acquiescence applies at all, it applies only to the General Assembly's acquiescence with regard to the opinion and findings of the Attorney General. Application of the doctrine to the licensing practices of the Department is inappropriate.

CONCLUSION

The mandate given by the Indiana legislature to the Department of Financial Institutions is to protect the interests of Indiana consumers against unfair practices by suppliers of consumer credit. In carrying out this mandate, the Department has determined that the practices of the Industry violate Indiana's civil and criminal usury statutes. This Court should rule in favor of Plaintiffs and find that the Industry cannot charge a minimum finance charge that exceeds the

statutory maximum interest rates found in Indiana Code sections 24-4.5-3-508(2) or 35-45-7-2.

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WORD COUNT CERTIFICATION

The undersigned certifies that this brief contains less than the 8,400 words allowed pursuant to this Court's order. The foregoing, including all footnotes but excluding the Caption, Table of Contents, Table of Authorities, the Word Count Certificate, and the Certificate of Service has 8,392 words as determined by the word processing system used to prepare this Brief (Word Perfect 8.0^{7}).

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CERTIFICATE OF SERVICE

The undersigned counsel for the Indiana Department of Financial Institutions certifies that a true and correct copy of the above and foregoing has been sent first class United States mail, postage prepaid to the following counsel of record this 18th day of December, 2000.

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